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# **FRANCIS LIEBER AND THE LIEBER CODE – AGAINST THE INHUMANITIES OF WAR**

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Freiburg 8/2011

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## **A. Life\***

### **I. Biography**

Francis Lieber referred to himself as a 'philosophic historian' and is commonly called a German-born American jurist, political philosopher, political scientist, scholar and publicist.<sup>1</sup> His life was multifaceted and so are his publications – and his influence. Francis Lieber was not only one of the most important American jurists of his time, it is his immense impetus for the development of international law, especially in regard to the humanisation of the law of war, that contributed to his universal appreciation; this is evident in the 21<sup>st</sup> century even more than during his lifetime.

Francis Lieber (originally *Franz Lieber*) was born in Berlin, at this time capital of the Kingdom of Prussia, on 18 March 1798 – and not as sometimes stated in 1800.<sup>2</sup> He left Europe as a young man for North America where he died in New York on 2 October 1872. To understand the life and work of Francis Lieber, it is necessary to separate the two phases of his life: the formative years of boyhood, youth and young adulthood in Prussia and Europe during the Napoleonic era, and his later life in North America which is characterised by a remarkable productivity, and influential academic career.

His youth in Europe was affected by his engagement as a soldier and freedom fighter, the deprivations and cruelties of war, by political oppression and detainment and, for brief periods of time, his studies at different universities. His childhood was already overshadowed by the Napoleonic Wars. At the age of eight, he was deeply disturbed by seeing Napoleon's troops enter Berlin.<sup>3</sup> He joined the Prussian Army only 16 years old, fought in Napoleonic Wars, and took part in the Battle of Waterloo in 1815, where he was seriously injured. It was this personal experience of the cruelties of war which was the

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\* A shortened version of this paper will be published in *The Oxford Handbook on the History of International Law* (OUP Oxford, forthcoming).

<sup>1</sup> B Röben *Johann Caspar Bluntschli, Francis Lieber und das moderne Völkerrecht 1861–1881* (Nomos Verlagsgesellschaft Baden-Baden 2003) 85.

<sup>2</sup> See *Johann Caspar Bluntschli* (n 1) 15.

<sup>3</sup> See *Johann Caspar Bluntschli* (n 1) 15.

reason for his later lifelong aim to humanise the laws of war.<sup>4</sup> Because of his political activities with the aim of uniting Germany, he was imprisoned in Berlin and denied admission to all universities of Prussia.<sup>5</sup> He finally started his academic studies in 1820 at the more liberal University of Jena and finished them in the same year with a dissertation in mathematics. After further but unfinished academic studies,<sup>6</sup> Lieber went to Greece in 1821 and fought in the Greek War of Independence. He left Greece the same year and went to Rome where he worked as a tutor. Back in Berlin in 1823, he was persecuted and detained again. In 1826 he fled from the illiberal, repressive Prussia to London. Lieber finally left Europe in 1827 and emigrated to Boston, North America to promulgate the leading idea and affection of his life: the life of civil freedom and liberty.<sup>7</sup>

North America was Lieber's 'fortunate country, whose happiness is founded on its liberty' as he wrote as an editor of the *Encyclopaedia Americana* in 1830.<sup>8</sup> His academic career formally started 1835, when he became professor of history and political economics at South Carolina College. As Lieber was a clear opponent of slavery,<sup>9</sup> he had to leave South Carolina in 1857 and moved to New York. Nearly sixty years old, he was appointed professor of political economy and history at Columbia College, New York.<sup>10</sup> At Columbia

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<sup>4</sup> See *Johann Caspar Bluntschli* (n 1) 16 with further references.

<sup>5</sup> F Freidel *Francis Lieber, Nineteenth-Century Liberal* (Lawbook Exchange New Jersey 2003).

<sup>6</sup> Further studies followed at the Universities of Halle and Dresden in 1820 and 1821; *Francis Lieber, Nineteenth-Century Liberal* (n 5) 29.

<sup>7</sup> F Lieber *The Ancient and the Modern Teacher of Politics* (Board of Trustees of Columbia College New York 1859) at 34.

<sup>8</sup> F Lieber (ed) *Encyclopaedia Americana* (Mussey & Co. Boston 1830) vol 1 at vii. Besides to this editing work he was – inter alia – director of the first Boston swimming school: Lieber had to earn money and he believed that it is necessary to train the body as well as the mind; *Johann Caspar Bluntschli* (n 1) 20; *Francis Lieber, Nineteenth-Century Liberal* (n 5) 105 et seq.

<sup>9</sup> *Francis Lieber, Nineteenth-Century Liberal* (n 5) 236.

<sup>10</sup> *Francis Lieber, Nineteenth-Century Liberal* (n 5) 293; *Johann Caspar Bluntschli* (n 1) 32.

College, he was co-founder of the law school and became professor of political science in 1860. During the American Civil War, he was additionally legal advisor of the United States especially in questions of the laws of war.<sup>11</sup>

## II. Publications

Although he had already published articles in Germany and contributed to German periodicals during his time in London, the decisive publications of Lieber's career were written and edited after his emigration to North America: he became editor and founder of the *Encyclopedia Americana* (1829–1833), a 13 volume encyclopaedia. During his time at South Carolina College, he wrote, inter alia, *A Manual of Political Ethics* (1838–1839).<sup>12</sup> Lieber never published a book on public international law,<sup>13</sup> but he drafted his most influential contribution in regard to the development of international law: the *Instructions for the Government of Armies of the United States in the Field*, known as the so-called Lieber Code (1863).<sup>14</sup> Since 1862 Lieber was in close contact by way of exchange of ideas in letters and writings with all relevant international legal experts of his time, as for instance Wilhelm August Heffter (1796–1880) and Johann Caspar Bluntschli (1808–1881).<sup>15</sup> Shortly after Lieber's death, the *Institut de droit international* was founded (1873); an institute that was also based on Lieber's ideas.<sup>16</sup>

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<sup>11</sup> For an overview see *Johann Caspar Bluntschli* (n 1) 33 et seq.

<sup>12</sup> Other important publications during this time in the area of legal theory and philosophy of law are *On Legal and Political Hermeneutics* (C.C. Little and J. Brown Boston 1838); *Laws of Property: Essays on Property and Labor, as connected with Natural Law and the Constitution of Society* (Harper New York 1842); and *On Civil Liberty and Self Government* (R. Bentley London 1853).

<sup>13</sup> *Johann Caspar Bluntschli* (n 1) 38.

<sup>14</sup> It was Francis Lieber and the Lieber Code, which gave Lieber's friend Johann Caspar Bluntschli the impulse to write his famous book on international law *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (C.H. Beck'schen Buchhandlung Nördlingen 1868); see *Johann Caspar Bluntschli* (n 1) 1.

<sup>15</sup> *Johann Caspar Bluntschli* (n 1) 69 et seq.

<sup>16</sup> *Johann Caspar Bluntschli* (n 1) 78.

**B. Main work and influence: The Lieber Code**

On behalf of US President Lincoln, Francis Lieber prepared the General Order no 100 containing the *Instruction for the Government of the Armies of the United States in the Field* of 24 April 1863.<sup>17</sup> It has since become known as the Lieber Code. The Lieber Code consists of 157 articles governing, inter alia, martial law, public and private property of an enemy, the treatment of deserters, prisoners of war, hostages, and partisans, armistices, insurrections, civil wars, and rebellions. The last chapter (IX.) contains rules on non-international armed conflicts. The Lieber Code was adopted by the United States of America for the 'information of all concerned', i.e. to inform the military personnel of the armed forces of the Union during the American Civil War (1861–1865) about the rules of the law of wars. Hence the code was an internal non-binding code of conduct and the first national manual on the laws of armed conflict.<sup>18</sup>

It was Lieber's aim to prevent or diminish the worst cruelties and inhumanities of war.<sup>19</sup> However, it would be imprecise to say that the Lieber Code is a codification of the laws of war of 1863. Concerning the basis of the code, Lieber himself stated in a letter to a colleague:

[Y]ou, well-read in the literature of this branch of international law, know that nothing of the kind exists in any language. I had no guide, no groundwork, no text-book ... . Usage, history, reason, and conscientiousness, a sincere love of truth, justice and civilization have been my guides.<sup>20</sup>

Being a military manual, the Lieber Code is not a competent source of international law but it provides evidence of State practice and of the *opinio iuris*

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<sup>17</sup> See the Introduction of the Lieber Code: '... prepared by Francis Lieber, LL.D., and revised by a board of officers ... having been approved by the President of the United States.'

<sup>18</sup> See *Francis Lieber, Nineteenth-Century Liberal* (n 5) 334 et seq.; T Meron 'Francis Lieber's Code and Principles of Humanity' (1998) 36 *Columbia Journal of Transnational Law* 269–82, at 269 et seq. and 280; RS Hartigan *Lieber's Code and the Law of War* (Precedent Publishing Chicago 1983) at 2.

<sup>19</sup> *Lieber's Code and the Law of War* (n 18) 13.

<sup>20</sup> Quoted in *Lieber's Code and the Law of War* (n 18) 10.

of the United States in regard to the laws of land warfare at that time. De facto the Lieber Code laid down rules which were, at least partly, rules of the customary laws of war of the time and, as a military manual, demonstrated the will of the United States to bring these rules into effect. Practically, the Code strongly influenced the further codification and development of the laws of war and the adoption of similar manuals by other States.<sup>21</sup>

Despite having been drafted a century ago, the Code still embodies the modern or 'civilised' laws of war and codified legal limitations of the right to harm the enemy during a war that are still valid today.<sup>22</sup> A striking example is the principle of limitation, which says that only damages and harm, which are militarily necessary, are allowed according to the laws of war. The code stated that even during a war it is not allowed to harm the enemy for individual aims, as for example private revenge or private gain (articles 11 and 16 Lieber Code). According to Lieber, a war between nations is a public war, a state of armed hostility between sovereign nations. In a public war, only means that are indispensable for securing the ends of the war are permitted. According to this line of reasoning, the code established the rule that destruction and seizure of enemy property were prohibited unless imperatively

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<sup>21</sup> The Code was the model for the Geneva Convention of 1864 followed by the Declaration of St. Petersburg of 1868, and for the 1874 Brussels International Declaration on the Laws of War which was never adopted but influenced the 1899 Hague Rules of Land Warfare, see Lieber's Code and the Law of War (n 18) 23. Hence not only the emergence of international humanitarian law is linked to the code but also the history of modern codes of conduct in general, see J Friedrich 'Codes of Conduct' in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (OUP Oxford 2008) online edition [www.mpepil.com] visited on [15 March 2011].

<sup>22</sup> The notion used by JC Bluntschli *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt* (2<sup>nd</sup> edn C.H. Beck'schen Buchhandlung Nördlingen 1872) at 34 et seq.

demanded by the necessities of war. This principle of limitation stands in sharp contrast to all theories of total war.<sup>23</sup>

Another example is the principle of individual criminal responsibility for war crimes. The Lieber Code stipulated an individual criminal responsibility if the rules of the laws of war were not obeyed. Even the defence of superior order was not recognised by the code. The aim of these rules was twofold: the effectiveness of the international law of war was to be secured, and the discipline of the troops maintained. However, for a conviction certain procedural rights and the principle of proportionality had to be observed according to the code.

Further evidence that the Lieber Code is a nucleus of the modern, civilised laws of war can be found in all parts of the code; the first express prohibition of torture to extort confessions was stated in the Lieber Code.<sup>24</sup> The duty to protect cultural property was included in the code as well and has gained widespread acceptance. It contained rules that are decisive for the modern understanding of the status of a prisoner of war (articles 49 and 50 Lieber Code).<sup>25</sup>

In an overall assessment, it was the influential achievement of Lieber that his code effectively incorporated the aim to humanise the rules of land warfare and systematised all rules applicable during land warfare: he was the catalysing force for the development of the modern, humanitarian law.

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<sup>23</sup> For details see S Vöneky 'Der Lieber Code und die Wurzeln des modernen Kriegsvölkerrechts' (2002) 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 423–60 at 425.

<sup>24</sup> D Kretzmer 'Prohibition of Torture' in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (OUP Oxford 2008) online edition [www.mpepil.com] visited on [15 March 2011].

<sup>25</sup> RM Chesney 'Prisoners of War' in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (OUP Oxford 2008) online edition [www.mpepil.com] visited on [15 March 2011]. The Code even tackled the problem of irregular fighters, which shall be treated as 'highway robbers or pirates' but not as prisoners of war (art 82 Lieber Code).